No. 314.

Supreme Court of the United States.

October Term, 1898.

Brief of Colston, Harmon, Goldsmith & Hoadly for P. E.

No. 314.

Filed April 10, 1899

Office Supreme Court U. S.
FILED
APR 10 1899
JAMES H. McKENNEY,
Clerk.

THE BALTIMORE & OHIO SOUTHWESTERN RAILWAY COMPANY,

Plaintiff in Error,

vs.

WILLIAM VOIGT,

Defendant in Error.

Brief for Plaintiff in Error.

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BRIEF FOR PLAINTIFF IN ERROR.

STATEMENT OF CASE.

Action was brought in the Circuit Court of the United States for the Southern District of Ohio, August 17, 1896, by William Voigt against The Baltimore & Ohio Southwestern Railway Company to recover the sum of $35,000 for personal injuries sustained by him on the 30th day of December, 1895, at Coal City, Hamilton County, Ohio, while he was in an express car hauled in one of the fast passenger trains of said railway company. The injury was caused by a collision between that train and another train of the said railway company going in an opposite direction.

Voigt was at the time in the employment of The United States Express Company in the capacity of express messenger in charge of express matter carried by the express company on the train of the railway company. The petition averred that Voigt was "travelling as a passenger for hire on one of defendant's trains, being an express messenger on said train." But, in fact, he was upon said train only by virtue of his employment as express messenger of said express company and of the contract hereinafter mentioned between said express company and said railway company.

To this action The Baltimore & Ohio Southwestern Railway Company filed an answer setting up two distinct defenses.

For a first defense the railway company admitted that on the 30th of December, 1895, Voigt was an express messenger on its train on said railroad, but denied he was at the time travelling as a passenger for hire. The railway company further admitted that the train came into collision with another of its trains on its railroad near Coal City, Ohio, and that in the collision Voigt sustained injuries.

For a second and separate defense the railway company answered that on the day in question it was, and had for a long time prior thereto been, a corporation under the laws of Ohio engaged in the operation of its railroad from Cincinnati to St. Louis and other places, and was so engaged at the time of the collision referred to, and that on the first day of March, 1895, it entered into a contract with The United States Express Company, a joint stock company duly authorized by law to carry on the express business and to enter into such contract, and that by said con-

tract it was agreed between the express company and the railway company, among other things, that the railway company would furnish for the express company on the railway company's line between Cincinnati and St. Louis cars adapted to the carriage of such express matter as the express company desired to have transported over said line, and that it was part of said contract that one or more employees of the express company should accompany said goods in the cars over the line of said railroad, and for such purpose should be transported in said cars free of charge; and that it was further provided in said contract that the express company should protect the railway company and hold it harmless from all liability the railway company might be under to employees of the express company for injury they might sustain while being transported by the railway company over its line for the purpose aforesaid, whether the injuries were caused by negligence of the railway company or its employees or otherwise. The railway company further averred that, pursuant to said contract with the express company, it placed upon its line of railroad for said express company certain cars, known as express cars, and that it was hauling one of said cars on one of its trains on the 30th of December, 1895, at the time said collision occurred, and that prior to the time of the accident Voigt had made application to the express company in writing for employment by it as an express messenger, and that in pursuance to said application he was, prior to and at the time of the collision, employed by the express company under a contract in writing between him and it, by the terms whereof he did assume the risk of all accidents and injuries that he might sustain in the course of his said employment, whether occasioned by negligence

and whether resulting in death or otherwise, and did undertake and agree to indemnify and hold harmless the said express company from any and all claims that might be made against it arising out of any claim or recovery on his part for any damage sustained by him by reason of any injury, whether such injury resulted from negligence or otherwise, and did agree to pay to said express company on demand any sum which it might be compelled to pay in consequence of any such claim, and did agree to execute and deliver to the corporation operating the transportation line (in this instance the said railway company) upon which he might be injured a good and sufficient release, under his hand and seal, of all claims, demands and causes of action arising out of any such injury or connected with or resulting therefrom, and did ratify all agreements made by the express company with any transportation line (in this instance said railway company) in which said express company had agreed or might agree that the employees of said express company should have no cause of action for injuries sustained in the course of their employment upon the line of such transportation company; and that the said Voigt did further agree to be bound by each and every of the agreements above mentioned as fully as if he were a party thereto. He did agree that his contract with the express company should enure to the benefit of any corporation upon whose line said express company should forward merchandise (in this instance the said railway company) as fully and completely as if made directly with the corporation. In said defense it was further set forth that at the time the plaintiff sustained the injuries for which the suit was brought he was in an express car being transported by the railway company over its line from Cincinnati to St.

Louis, pursuant to said contract between said express company and the railway company, and that said Voigt was at the time of the collision upon said car in pursuance to his contract with said express company and not otherwise.

To this defense a demurrer was interposed by Voigt on the ground that the allegations thereof did not constitute a defense to the action. Upon a hearing of that demurrer it was sustained and an entry was made in the cause, finding said demurrer well taken and sustaining the same; to all of which the railway company by its counsel excepted. (See opinion of circuit court sustaining the demurrer, 79 Fed. Rep. 561.)

Thereafter a stipulation in writing was filed in the case, agreeing that the issues of fact and law might be tried by the court without the intervention of a jury, and waiving a trial by jury. And thereupon the cause was tried upon the issues made by the petition and the answer aforesaid, and the court entered judgment in favor of the plaintiff for $6,000. To reverse that judgment The Baltimore & Ohio Southwestern Railway Company by writ of error removed the case into the United States Circuit Court of Appeals for the Sixth Circuit, where the error assigned was the sustaining of the demurrer of the plaintiff to the second defense of the answer of the defendant.

That court, after stating the case as set forth above, certified to this court the following question upon which it asks instruction:

QUESTION: Does said railway company assume towards said express messenger, while being carried in the course of his said employment in one of said express cars attached to a passenger train of said railway company, pursuant to the contract aforesaid, the ordinary liability of a

common carrier for hire, so as to render said railway company liable as such to said express messenger, notwithstanding the contract aforesaid, for injuries he might sustain by reason of a collision between the train to which the said express car was attached and another train of the railway company, caused by the negligence of employees of the railway company?

ARGUMENT.

To give an affirmative answer to this question would require the court to decide that under no circumstances can a railway company permit any person other than one of its own employees to ride upon its train in any other capacity than that of an ordinary passenger. The railway company, by the contracts mentioned in this case, has taken the utmost precaution to define the status of this express messenger and to exclude him from the category of a passenger. If the railway company has not succeeded in this it is because words are inadequate to accomplish it. The affirmative contention would create a class of passengers known as *passengers in law*—passengers *in invitum*. But the relation of passenger and carrier is created by contract and can not exist without the consent of the carrier. By consent of the carrier is meant consent to receive the person *qua* passenger. A person who by contract uses a car fitted up as his own office or workshop, the railway company furnishing the car and the motive power, is not a passenger.

Chief Justice Paxson, in Pennsylvania Railroad Co. v. Price, 96 Pa. St. 267, defining the word "passenger," well says:

"Mere locomotion is not travel in the popular use of the term. There are conductors on short lines of railroad in this state who have passed over more miles in the course of their employment than any traveler of ancient or modern times. Yet we would hardly call them traveled men. The sense given to particular words by our great lexicographers is always entitled to weight. Yet where a word is used in an act of assembly regard must be had to the circumstances surrounding its use. A more correct definition of the word in its legal sense would be, one who travels in some public conveyance by virtue of a contract, express or implied, with the carrier, as the payment of fare, or that which is accepted as an equivalent therefor."

And again, speaking of the meaning of the word "passenger," he said:

"Had the question been asked of any person, intelligent or otherwise, upon this train when the accident occurred, whether A. J. Price, the deceased, was a passenger upon said train, the answer would have been in the negative, that he was employed upon the train as a mail agent. Why then should we give to the proviso a forced construction not warranted by its language and repugnant to our common sense?"

Louisville, New Albany & Chicago Railway Co. v. Keefer, 146 Ind., p. 21, is a case directly in point. The suit was by a messenger of the American Express Company against the railroad company for injuries sustained. The contracts between the express company, the messenger and the railroad company were exactly like those involved in the present case. The defense was precisely the same that we are making here, and it was held that the contracts were valid and that the defense was good.

The court in that case, after reviewing all of the authorities, thus states its conclusion:

"Under the doctrine declared in the Express Cases, *supra*, the property was being carried by appellant, not as a common carrier in the performance of a public duty, but being carried, with a messenger in charge, as a private carrier, the right to have it and him carried having first been secured to the express company by private contract, the only way known to the law by which the right, either as to the goods or appellee as express messenger in charge, could be acquired.

"Appellee, when he went on the appellant's train and took charge of the express packages in the baggage car, did not go as a passenger who merely desired to be carried on the train from one point to another. Carriage was not the object of his going upon the train; that was merely incidental. His purpose was not to be upon the train, in the cars provided for passengers, but that he might handle and care for the property of his employer thereon, in the space set apart in the baggage car for that purpose. Under the authorities cited, it was not the duty of appellant, as a common carrier, to carry for the express company the goods or messenger in charge of them. The contract between appellant and the express company gave it and its messenger rights which appellant as a common carrier could not have been compelled to grant. Express Cases, *supra*; Bates v. Old Colony R. R. Co., *supra*; Hosmer v. Old Colony R. R. Co., *supra*.

"The contracts set out in the third paragraph of answer were not in regard to any duties appellant was required to perform as a common carrier, nor did such contracts attempt to limit the liability of appellant for negligence in the discharge of its duties as a common carrier, the same are therefore binding upon all the parties thereto. Appellee by his contract assumed all the dangers of the trip however occasioned, and undertook and agreed to release

and discharge appellant from all liability if he in any way should be injured in his person by the negligence of appellant, and authorized and empowered the express company to enter into a contract exempting appellant from all liability for injuries to appellee." (See pp. 34 and 35.)

Again, in P. C. C. & St. L. Ry. Co. v. Mahony, 148 Ind., p. 196, the Supreme Court of Indiana decided that contracts in every respect like the contracts which exist in this case were valid, and that therefore the express messenger was not a passenger in the ordinary sense of the term and that he could not recover for injuries sustained by the negligence of the railway company. The case was carefully considered in an elaborate opinion. Speaking of the contracts, the court said, p. 203:

"By the provisions of that contract the rights of the express company were fully measured. Its only right to be upon the tracks and right of way, through and by its servants, was by the provisions of that contract. Its license came only from the contract, and the appellee introduced the contract in evidence to show the right of his decedent to be upon the tracks. The express company, operating by servants, was present, on the occasion in question, by Romick, its agent. His rights were those of the express company, and could not be greater. He was there by the license given the express company, and he could not accept the license and reject the conditions upon which it was granted."

Again, in Blank v. Illinois Central Ry. Co., the Court of Appeals for the First District of Illinois has decided the same question in the same way, in an opinion rendered March 14, 1899, not yet published, but which we print as an appendix to this brief. Among other things, the court said:

"It was by virtue of the contract between the defendant and the express company that the plaintiff was upon the car when he was injured. He was not in the strict sense a passenger. Nor was the defendant in the strict sense a common carrier as to him. His being carried from one end of the express route to the other was for the purpose, and none other, of handling and caring for the property of his employer, the express company, which was being transported under the terms of the special contract between the express company and the defendant.

"It was not the duty of the defendant, as a common carrier, to carry for the express company its goods, or its messenger in charge of them, in the car in question. As a common carrier the defendant was not compelled to grant that right to the express company. It was only because of the special contract that such rights, superior to the rights of the public, were conferred, and being upon the car by virtue of such contract rights, the plaintiff was there subject to the burdens of the contract. His rights were those of his employer, the express company, and no greater. He could not accept the right to be there under the contract, and reject the conditions under which the contract gave the right."

Bates v. Old Colony Railroad, 147 Mass. 255, is also directly in point. That was an action brought by an express messenger for an injury sustained by the negligence of the railway company while he was running as express messenger on one of its trains. There was a contract between the railway company and the express company whereby the railway company agreed to transport express matter at a specific price, and to transport the express messenger in express car or baggage car *at season ticket rates*, less than regular rates. This ticket was paid for by the express company, and was upon condition that the messen-

ger should assume all risk of accident or injury resulting therefrom and hold the railway company harmless from all accident or injury received while being thus transported. The messenger also signed a contract with the railroad, reciting that, in consideration of being allowed to ride on the express or baggage car for the more convenient dispatch of his business as expressman, he would assume all risk of injury and hold the railroad company harmless. The railway company thereupon issued to the express company a season ticket for the plaintiff. He received his injuries while riding on this ticket in the express car. The rules of the railroad company prohibited passengers from riding in the express or baggage car unless they had signed a release. The express business over the railroad company's line was carried on by express messengers riding in the baggage car attached to passenger trains. The Supreme Court of Massachusetts held that plaintiff was not a passenger and was not entitled to recover, and that the contract was perfectly valid. Among other things the court said:

"The contract in question was made to give him a right which did not belong to him as a passenger. The plaintiff, having the rights of a passenger, desired to ride in the baggage car. The regulations of the defendant, as well as personal prudence, forbade him to ride there, and, if he had attempted to do so, he not only would have assumed all the risks of injuries resulting therefrom, but would have been liable to be expelled from the car by the defendant." (See p. 265.)

And again on p. 266:

"The question of the right of carriers to limit their liability for negligence in the discharge of their duty as

carriers by contracts with their customers or passengers in regard to such duties, does not arise under this contract as construed in this case. See Railroad Co. v. Lockwood, 17 Wall. 357; Griswold v. New York & New England Railroad, 53 Conn. 371. It was not a contract for carriage over the road, *but for the use of a particular car.* The consideration of the plaintiff's agreement was not the performance of anything by the defendant which it was under any obligation to do, or which the plaintiff had any right to have done. It was a privilege granted to the plaintiff. The plaintiff was not compelled to enter into the contract in order to obtain the rights of a passenger. Having these rights, he sought something more. The contract by which he obtained what he sought did not impair his rights as a passenger, and he was under no compulsion to enter into it."

So, in Hosmer v. Old Colony R. R. Co., 156 Mass., p. 506, the plaintiff was an express messenger riding on a season ticket permitting him to ride in the baggage car where passengers were not permitted to ride. For "the more convenient dispatch of his business as an expressman" he was allowed to ride there. In consideration of being allowed to ride in the baggage car he agreed to assume all risks resulting therefrom. The plaintiff, while riding in the baggage car in the prosecution of his business as an expressman, was injured by the derailment of the train owing to an obstacle left upon the track by the employees of the railway. The engine, baggage car, smoking car, two day passenger coaches and a Pullman car were derailed. Four cars remained on the rails. Twenty-three passengers were killed and sixty or seventy wounded. The injured were "scattered through the various cars including those that remained on the track." It was held the plain-

tiff could not recover. He was held not to be a passenger because by his contract he was permitted to ride, not for the purpose of travel, but in the prosecution of his private business, in a place not intended for passengers. The court said:

"The place where he was riding was one in which the defendant was under no obligation to carry him. The contract gave the plaintiff a privilege which he sought for his own convenience." (See p. 508.)

These cases distinguish between persons who use cars as a place of business and those who use them as a means of locomotion. The object for which one contracts to use a car is the criterion which determines whether he is or is not a passenger.

In Hughson v. Richmond & Danville R. Co., 2 App. Cas. (D. C.), p. 98, Chief Justice Alvey, speaking for the court, held that a Pullman porter, though not a co-servant with the employees of the railway company, "yet was not a passenger in any such sense as to require of the railroad company the highest degree of skill and care in the construction and maintenance of its roadway and machinery, and the operation of its road and the running of its train, such as are required in the case of a passenger." (See p. 103.)

In Griswold v. N. Y. & N. E. R. Co., 53 Conn., p. 371, where a restaurant keeper having the privilege from the railroad company to sell on the trains, sandwiches, fruits, etc., and as part of the arrangement the company permitted the boy engaged in the selling to ride for that purpose on a free pass, the Supreme Court of Connecticut held that the boy could not recover for injuries sustained on the train occasioned by the negligence of the company's servants.

Under the auspices of the Union News Company this kind of boy has become familiar to all travelers. He is known as the "butcher." It seems a shock to common sense to say that he is necessarily a passenger; and that therefore his own and the Union News Company's contract of release to the railroad company are void.

It is begging the question, or reasoning in a circle, to say that this express messenger was a passenger, and that therefore the contracts relied upon as a defense are void. He could only be deemed a passenger by breaking down those very contracts, for it is they that show he is not a passenger. We are not aware of any statute or rule of law which prohibits a railway company from permitting a person to ride upon its cars in some other capacity than that of passenger, if such person desires to ride that way for the privilege of being allowed to use a separate car to conduct a business along the line.

Our adversaries say that public policy is a barrier to the making of such contracts. But we inquire, where is there a definition, such as that, of public policy? Public policy is a convenient resort in many cases to enable a party to avoid a contract. Cutting down contracts that people have entered into of their own free will and for their own advantage is a dangerous proceeding. A court could hardly be worse engaged. Nothing can be claimed as a rule of public policy unless it clearly exists. The court can not call up such rules for the occasion.

The famous utterance of Burrough, J., in Richardson v. Mellish, 2 Bing., at p. 252, seems peculiarly applicable here. He said:

"I, for one, protest, as my lord has done, against arguing too strongly upon pubilc policy; it is a very unruly

horse, and when you once get astride it you never know where it will carry you. It may lead you from the sound law. It is never argued at all but when other points fail."

This animal, we think, carried the learned circuit judge far afield in the present case.

It may not be absolutely correct to say "public policy" is never argued "but when other points fail," yet resort to it can not be otherwise justified in this case.

This statement of Burrough, J., has been cited approvingly many times; a conspicuous instance is its use by Lord Bramwell in Mogul Steamship Co. v. McGregor (1892), A. C., at p. 45. Lord Bramwell also quoted a statement of Cave, J., made in *In re* Mirams (1891), 1 Q. B. 594, as follows:

"As we all know, certain kinds of contracts have been held void at common law on this ground—a branch of the law, however, which certainly should not be extended, as judges are more to be trusted as *interpreters* of the law than as *expounders of what is called public policy.*" (Italics ours.)

Lord Bramwell modestly added he would venture to make another remark, which he did as follows:

"No evidence is given in these public policy cases. The tribunal is to say, as matter of law, that the thing is against public policy and void. How can the judge do that without any evidence as to its effect and consequences?" (See p. 45.)

And so we ask, how can any judge say this contract contravenes public policy? There has been no evidence that it does so. It has not been shown that accidents are more frequent on railroads that carry express messengers under such contracts as exist in this case than on railroads that do not. The responsibility arising from having express matter, often consisting of articles of great value, would

afford, one would think, an additional incentive to the observance of care by the operating company.

We also add the pertinent observation of Lindley, M. R., in the Court of Appeal, in Underwood & Son, Limited, v. Barker (1899), 1 Ch., at p. 305:

"And to allow a person of mature age, and not imposed upon, to enter into a contract, to obtain the benefit of it, and then to repudiate it and the obligations which he has undertaken, is, *prima facie* at all events, contrary to the interests of any and every country."

The highest court in the state in which this contract was made, the Supreme Court of Ohio, has well said, in P. C. C. & St. L. Ry. Co. v. Cox, 55 Ohio State, at p. 515:

"The liberty of contract, being one of those rights secured by our constitution, is not to be restrained upon any insufficient or mere fanciful conceit of what may possibly happen. The citizen who is *sui juris* has a right to make a contract beneficial to himself when neither immoral, fraudulent nor illegal, and he should not be restrained in the exercise of such right unless the public welfare clearly compels it."

This was in a case where that court held that a contract between an employee and a railroad company was valid, although it was a contract whereby an employee, by entering "The Voluntary Relief Department," agreed to a deduction from his wages of seventy-five cents per month, to form, with like contributions from other employees and from the railroad company, a relief fund for the benefit of employees in case of sickness, accident or death; and he also agreed that, in case of accident, the acceptance by him of relief from the fund would have the effect to release the company from liability for damages. On the particular question whether the contract was against public policy the court said:

"To be so, it must, in some manner, contravene public right or the public welfare. It must be shown to have a mischievous tendency, as regards the public. And this should *clearly appear.*" (Italics ours.)

The United States Circuit Court of Appeals has said:

"The burden is on the party who seeks to put a restraint upon the freedom of contracts to make it plainly and obviously clear that the contract is against public policy."

Hartford Fire Insurance Co. v. Chicago, M. & St. P. Ry., 70 Fed., at p. 207.

Sir G. Jessel, M. R., said:

"It must not be forgotten that you are not to extend arbitrarily those rules which say that a given contract is void as being against public policy, because if there is one thing which more than another public policy requires it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts when entered into freely and voluntarily shall be held sacred and shall be enforced by courts of justice. Therefore, you have this paramount public policy to consider—that you are not lightly to interfere with this freedom of contract."

Printing & Numerical Registering Co. v. Sampson, Law Rep., 19 Eq., p. 465.

In Tallis v. Tallis, 1 Ell. & Bl., at * p. 412, Lord Campbell, C. J., in overruling a plea setting up that the contract sued on was void as in restraint of trade, said:

"And, unless the defendant made it plainly and obviously clear that the plaintiff's interest did not require the defendant's exclusion, or that the public interest would be sacrificed if the defendant's intended publications are excluded, according to the general rule before referred to, we ought not to hold the contract void."

In Rousillon v. Rousillon, Law. Rep., 14 Ch. Div , 365, Fry, J., speaking of Tallis v. Tallis, said:

"In other words, the Court of Queen's Bench threw upon the defendant, who alleged the invalidity of the contract on this ground, the burden of showing that it was plainly and obviously clear that the protection extended, by the proposed exclusion of the defendant's publications, beyond what the plaintiff's interest required. And such, in my opinion, ought to be the rule of law upon this point, because the defendant is seeking to put a restraint upon the freedom of contract, and he who does that must, I think, show that it is plainly necessary for the purposes of freedom of trade. I adopt the views expressed by the Master of the Rolls, in Printing & Numerical, etc., Co. v. Sampson, as to the necessity of courts being careful how they invade the freedom of contract."

In the present case Voigt was a man "of full age and competent understanding," and the contract was entered into by him "freely and voluntarily." Voigt indemnified the express company and the express company indemnified the railway company. If Voigt recover from the railway company it in turn can recover from the express company, and it in turn can recover from Voigt. To obviate such circuity the railway company can avail itself directly of the contract between Voigt and the express company, and the effect is the same as if Voigt had entered into the contract with the railway company directly. (Phœnix v. Erie, 117 U. S. 397.) Indeed, Voigt agreed that the contract should enure to the benefit of the railway company. (See certificate, p. 3.) Voigt also expressly ratified the agreement between the express company and the railway company. (See certificate, p. 6.) The railway company is in effect defending for the express company. Voigt's

contract operates as an assignment to the railway company of any cause of action he has against it. The "paramount" public policy to consider is, therefore, that you are not lightly to interfere with that contract, and where it is claimed there is a public policy which destroys that contract, it must be made to clearly appear that the "public interest would be sacrificed" by the stipulations found in the contract. We claim no public interest is sacrificed by the contracts in question. The grounds upon which a common carrier is not permitted to stipulate against its own negligence are well understood, and do not exist in this case. Those grounds are that such stipulations are efforts to release the common carrier from duties imposed by law; that the parties do not deal on equal footing; and that such stipulations tend to a relaxation of that vigilance which the carrier should exercise. None of these objections can be urged against this contract.

Voigt was not a passenger of the railway company nor even its employee.

II.

THE RAILROAD COMPANY WAS NOT A COMMON CARRIER OF THE EXPRESS COMPANY, ITSELF A COMMON CARRIER, NOR OF THE EXPRESS COMPANY'S GOODS, NOR OF ITS MESSENGERS.

The express company was the only common carrier of the goods which were in charge of Voigt. The railroad company merely hired to the express company that car and the necessary power to move it. The railroad company

entered into no contract with the owners of the goods carried in the express car; received no compensation for their carriage; had no custody of the goods nor any lien on them for freight. None of the features which indicate the relation of carrier and shipper existed as between the consignors of the goods and the railroad company.

In Bank of Kentucky v. Adams Express Co., 93 U. S., p. 174, this court holds that a railroad company supplying a car and motive power to an express company is mere agent of the express company, and that the express company is liable for the negligence of the railroad company to the same extent as though the negligence were its own. In the case cited certain packages of money received by the express company to be carried from New Orleans to Louisville were lost by fire caused by the giving way of a railroad trestle owing to decayed timbers. In that case the court said:

"The railroad company, in transporting the messenger of the defendants and the express matter in his charge, was the agent of somebody; either of the express company, or of the shippers or consignees of the property. That it was the agent of the defendants is quite clear. It was employed by them, and paid by them. The service it was called upon to perform was a service for the defendants; a duty incumbent upon them, and not upon the plaintiffs. The latter had nothing to do with the employment. It was neither directed by them, nor had they any control over the railroad company or its employees. It is true, the defendants had also no control over the company or its servants; but they were its employers, presumably they paid for its service; and that service was directly and immediately for them. Control of the conduct of an agency is not in all cases essential to liability for the consequences

of that conduct. If anyone is to be affected by the acts or omissions of persons employed to do a particular service, surely it must be he who gave the employment. Their acts become his, because done in his service and by his direction. Moreover, a common carrier who undertakes for himself to perform an entire service has no authority to constitute another person or corporation the agent of his consignor or consignee. He may employ a subordinate agency, but it must be subordinate to him, and not to one who neither employs it nor pays it, nor has any right to interfere with it." (See p. 182.)

In that case the court below had charged the jury that if the express company exercised due care in selecting a safe railroad to carry the goods, it had discharged all the duty it owed to its patrons; but this the court held was an erroneous view; and, that the railroad company was the mere agency of the express company to affect the transportation, which the express company had undertaken.

Suppose the express company, instead of hiring a part of the train to carry on its independent business of a common carrier, preferred to run its own cars over the roadbed of a railroad company, paying a stipulated price for the privilege, can it be doubted that the railroad company might lawfully contract that it would not be liable for injuries to the servants or goods of the express company occurring in the operation of such trains?

The railroad company not being a common carrier of the goods that were being hauled in this car at the time of the accident to Voigt, how did it become a common carrier of the messenger, who was himself the servant of the carrier of the goods? The hauling of the messenger does not grow out of any contract between him and the railroad

company, but is a mere incident of the express company's hiring the railroad company to carry its goods.

When the railroad company agreed with the express company to haul goods and also an employee, who goes along as a representative of the express company for the purpose of caring for the goods and seeing to their delivery, it no more assumes as to such messenger the obligation of a carrier than it assumes it towards the express company in respect of the goods carried for it.

The express company is not the shipper or consignor of the goods, but merely hires from the railroad company facilities for performing obligations of its own as a common carrier. Does it make any difference whether the express company performs its duties as a common carrier by means of instrumentalities which it owns and operates or by instrumentalities which it hires others to employ?

All the requirements dictated by public policy for the control of carriers are satisfied when the express company is held to the liability of a common carrier. Public policy does not go further and require a double responsibility, namely, that that of the railroad company should be added to the responsibility of the express company. Can it be doubted that the railroad company might, in its contract with the express company, require as a term of the hiring that it be held to no responsibility for the goods? Would any public interest be sacrificed by such an arrangement? The public has delivered its goods to the express company and has secured its responsibility as a common carrier for their safe transportation. Would it be any concern of the public thereafter upon what terms the express company employed the railroad company to do its work of carrying the articles? Whatever those terms might be, the com-

on carrier responsibility of the express company would continue.

The railroad company, in carrying out the contract of hire between it and the express company, in no sense acts as a common carrier. Such is clearly the doctrine of this court in the Express Cases (117 U. S., p. 1). In those cases this court traced the history of the express business in the United States and elsewhere. It showed that at the very beginning of the business in 1839 in this country the idea was that Harnden was the only party responsible for the goods. His advertisement is shown in the report of the case to be as follows:

"Wm. F. Harnden, having made arrangements with the New York and Boston Transportation and Stonington and Providence Railroad Companies, will run a car through from Boston to New York and *vice versa*, via Stonington, with the mail train daily, for the purpose of transporting specie, small packages of goods, and bundles of all kinds."

Such continues to this day to be a correct statement of the method of continuing the business. His followers in the business, the present express companies, are today doing exactly that thing, namely, running a car "through with the mail train daily." The express business is theirs and not the railroad companies'. Express business has become a distinct business, requiring special methods for its conduct. It is further described and dealt with in the same Cases as the business of

"Receiving and forwarding upon railroads, steam vessels and other vehicles of rapid transportation, in a safe and secure manner, and with the greatest practicable expedition, in the special care and custody of its own employees, and at destination personally delivering packages of money

or currency, gold and silver bullion, bonds, bank notes, deeds and other valuable papers, jewels, silks, laces and other articles of great value, requiring for their security extraordinary care and precaution, and also parcels of goods, wares and merchandise requiring great dispatch or careful handling, and also fruit, vegetables, fresh meats, fish, oysters, fish spawn and other articles liable to decay or other injury from delay; and also live animals requiring particular care and attention during transportation; and also for receiving and forwarding for collection bills, notes, drafts and accounts, and receiving and returning payment thereof; and also for receiving and forwarding all articles of trade and commerce, with the bills and charges of the shipper thereto attached, to be collected of the consignee on delivery of such articles and returned to shipper; and in so doing to afford the public, under a single contract and on assured responsibility, safe, reliable and speedy transportation from and to all points accessible only over two or more railroads, and generally to perform for the public all offices that, by usage, are incident to the class of carriers now well known, recognized and designated by the public as 'express carriers'." (See p. 3.)

It is a kind of business that railroad companies are unfitted to conduct successfully. Railroad companies can not sort out certain highly valuable articles, like jewelry, money, bonds and notes, nor perishable freight, such as live animals, requiring special attention, from the great mass of freight and put the same in charge of special messengers. In consequence of these conditions there has come into existence a special class of carriers, well known, recognized and designated by the public as "express carriers." They have taken upon themselves the conduct of this business. They have provided themselves with special facilities for doing it, and the

conduct of this business by express companies has satisfied the entire public want. The law therefore regards the railroad companies as not being common carriers as to this express business. There is a clear line of demarkation separating that business from the ordinary business of a common carrier by rail. Therefore it is a recognized right on the part of railroad companies to hire themselves to one express company without being obliged to do the like for another express company, which would not be the case were the railroad companies common carriers *quoad hoc*; for then they would be obliged to perform the same service for all.

In the Express Cases the court said:

"But it is neither averred in the bills, nor shown by the testimony, that any railroad company in the United States has ever held itself out as a common carrier of express companies, that is to say, as a common carrier of common carriers. On the contrary it has been shown, and, in fact, it was conceded upon the argument, that, down to the time of bringing these suits, no railroad company had taken an express company on its road for business except under some special contract, verbal or written, and generally written, in which the rights and the duties of the respective parties were carefully fixed and defined. These contracts, as is seen by those in these records, vary necessarily in their details, according to the varying circumstances of each particular case, and according to the judgment and discretion of the parties immediately concerned. It also appears that, with very few exceptions, only one express company has been allowed by a railroad company to do business on its road at the same time." (See p. 21.)

Again the court said:

"The reason is obvious why special contracts in refer-

ence to this business are necessary. The transportation required is of a kind which must, if possible, be had for the most part on passenger trains. It requires not only speed, but reasonable certainty as to the quantity that will be carried at any one time. As the things carried are to be kept in the personal custody of the messenger or other employee of the express company, it is important that a certain amount of car space should be specially set apart for the business, and that this should, as far as practicable, be put in the exclusive possession of the expressman in charge. As the business to be done is 'express,' it implies access to the train for loading at the latest, and for unloading at the earliest, convenient moment. All this is entirely inconsistent with the idea of an express business on passenger trains free to all express carriers. Railroad companies are by law carriers of both persons and property. Passenger trains have from the beginning been provided for the transportation primarily of passengers and their baggage. This must be done with reasonable promptness and with reasonable comfort to the passenger. The express business on passenger trains is in a degree subordinate to the passenger business, and it is consequently the duty of a railroad company in arranging for the express to see that there is as little interference as possible with the wants of passengers. This implies a special understanding and agreement as to the amount of car space that will be afforded, and the conditions on which it is to be occupied, the particular trains that can be used, the places at which they shall stop, the price to be paid, and all the varying details of a business which is to be adjusted between two public servants, so that each can perform in the best manner *its own particular duties*. All this must necessarily be a matter of bargain, and it by no means follows that, because a railroad company can serve one express company in one way, it can as well serve another company in the same way, and still perform its other obligations to the public in a satisfactory manner. The car space that can be given

to the express business on a passenger train is, to a certain extent, limited, and, as has been seen, that which is allotted to a particular carrier must be, in a measure, under his exclusive control. No express company can do a successful business unless it is at all times reasonably sure of the means it requires for transportation. On important lines one company will at times fill all the space the railroad company can well allow for the business. If this space had to be divided among several companies, there might be occasions when the public would be put to inconvenience by delays which could otherwise be avoided. So long as the public are served to their reasonable satisfaction, it is a matter of no importance who serves them. The railroad company performs its whole duty to the public at large and to each individual when it affords the public all reasonable express accommodations. If this is done, the railroad company owes no duty to the public as to the particular agencies it shall select for that purpose. The public require the carriage, but the company may choose its own appropriate means of carriage, always provided they are such as to insure reasonable promptness and security." (See pp. 23 and 24.)

It is to be observed that in all the cases involved in the decision in the Express Cases the contracts provided the railroad company should be exempted and indemnified by said express company against all loss or damage to goods or money transported by said express company. It is entirely proper that such contract for exemption should be made. The contract is entirely in line with the relation which exists as to the express business between the express carrier and the railroad company. A railroad company, in hauling one of these express cars, is no more a common carrier than a steamboat would be as to a barge it is towing under a contract for hire, although the steamboat at

the same time is on its regular trip with its load of passengers. The language of this court in the Express Cases, that "it is neither averred in the bills, nor shown by the testimony, that any railroad company in the United States has ever held itself out as a common carrier of express companies, that is to say, as a common carrier of common carriers," is convincing; *for, if the railroad companies are not common carriers of this business, as they are not, it leaves them in the category of mere hirers of certain facilities to the express companies, and that relation permits the railroad companies in making their contracts to incorporate terms excluding the liability of common carrier.*

This court has further said:

"A common carrier may, undoubtedly, become a private carrier, or a bailee for hire, when, as a matter of accommodation or special engagement, he undertakes to carry something which it is not his business to carry. For example, if a carrier of produce, running a truck boat between New York City and Norfolk, should be requested to carry a keg of specie, or a load of expensive furniture, which he could justly refuse to take, such agreement might be made in reference to his taking and carrying the same as the parties chose to make, not involving any stipulation contrary to law or public policy. But when a carrier has a regularly established business for carrying all or certain articles, and especially if that carrier be a corporation created for the purpose of the carrying trade, and the carriage of the articles is embraced within the scope of its chartered powers, it is a common carrier, and a special contract about its responsibility does not divest it of the character."

Railroad Co. v. Lockwood, 17 Wall., 377.

III.

THERE ARE OTHER CASES IN WHICH A RAILWAY COMPANY PERFORMING A TRANSPORTATION SERVICE IS NOT DEEMED TO ACT AS A COMMON CARRIER.

A company incorporated for the purpose of carrying on the business of a common carrier of persons and property may make many contracts which are not contracts for performing its public functions as a common carrier, and as to such contracts there is no doubt that their validity is not interfered with by the inhibition placed upon common carriers to contract for exemption from negligence. It is clear that disability to make a contract for such exemption does not depend upon the corporate existence or corporate character of the company. The disability grows out of the particular business to which the contract relates, and with reference to which it is made. It is not true that every service rendered by a railroad company with reference to transportation of persons or of goods is necessarily a service by it in its capacity of a common carrier of persons or of goods. A railroad company generally performing the duties of a common carrier may perform a transportation service which it is not compellable, by virtue of its character of a common carrier, to perform, and as to such service will not be a common carrier. Examples of this are found in the class of cases such as Coup v. Wabash, St. L. & P. Ry. Co., 56 Mich. 111, where it was held that a railway company which had agreed to furnish men and motive power to transport a circus of the plain-

tiff from Cairo to Detroit on cars belonging to the plaintiff, stopping at certain named points of exhibition, the plaintiff paying a fixed price therefor, was not liable as a common carrier and that such transportation was not a transaction with a common carrier as such; and that it was not the duty of a common carrier to transport special trains, and that the contract was valid and the railway company was not liable for injury due to negligence.

The same thing was decided in the case of Chicago, M. & St. P. Ry. Co. v. Wallace, 66 Fed. Rep. 506, by the United States Circuit Court of Appeals of the Seventh Circuit. The court, in its opinion, puts the argument thus:

"Why could not the railroad company say: 'You wish your property carried in your own private cars, which is contrary to our usual rules and regulations, and at greatly reduced rates. You wish your entire circus troupe, horses, animals, and all the paraphernalia and accompaniments of a circus, carried for less money than at our rates as common carriers it would cost you to have the persons alone of your company transported, and you desire that they be carried at special times, also contrary to our rules as common carriers, and which materially increases risks in our business. Now, here are our roadbed and our engines. They have answered our own purposes of transportation fairly well, if you wish to take upon yourself all risk of damage by accident, we will accept your proposition, and carry at the rates proposed.' There is nothing unlawful in this, unless we assume that the railroad company can not carry property or persons at all, except as common carriers, *which is against all rule and precedent.* No common carriers undertake to carry every species of property, in respect to which they have not held themselves out as common carriers. They may contract as private carriers, and in that case they may make any reasonable contract.

The railroad company as a common carrier could not enter into such a contract as this, because it can not as a common carrier limit the liability imposed upon it from considerations of public policy. But the case is different in respect to property of which it is not a common carrier. If any authority were needed upon so plain a proposition it is not difficult to find. In Hutchinson on Carriers (2d Ed., Sec. 44) it is stated:

"'A common carrier may, however, undoubtedly become a private carrier or a bailee for hire, when, as a matter of accommodation or special engagement, he undertakes to carry something which it is not his business to carry. The relation in such a case is changed from that of a common carrier to that of a private carrier, and, where this is the effect of a special arrangement, a carrier is not liable as a common carrier, and can not be proceeded against as such.'

"Again, at Section 73, it is stated:

"'And, even as to such carriers as are *prima facie* public or common carriers, it may be shown that in the particular instance, or under the circumstances of the case, they do not undertake to transport, and are not liable as common carriers.'" (See p. 511.)

The court then quotes other passages from the same author, notably Sections 56a and 56b of paragraph 2.

We respectfully submit that all of this reasoning is applicable to the hauling by a railroad company of an express car. It makes no difference whether the express car is actually owned by the express company or by the railroad company. It is for the time being rented to the express company and is lettered and marked with its name.

The same thing was decided by the Supreme Court of Massachusetts also in Robertson v. Old Colony Railroad Co., 156 Mass. 525. The court there said:

"Unless the defendant was under a common law or statutory obligation to carry the plaintiff in the manner he was carried at the time of the accident, it did not stand towards him in the relation of a comomn carrier, and the plaintiff can not recover. The only right which the plaintiff had to be on the train was by virtue of a contract which the defendant had made with the proprietors of a circus, whose servant the plaintiff was. By the terms of this contract, the defendant agreed to liaul certain cars belonging to the circus proprietors, according to a schedule of time fixed by the agreement, by which the work was to be done at eighteen different times, and nearly all of it at night. * * * The contract was simply to haul the cars as they were. This contract the defendant had the right to make, as it was under no obligation to draw the cars as a common carrier."

It must be conceded that a contract exempting a railroad company from liability for injury to express goods or express messengers can not be deemed as tending to endanger the lives of railway employees or of passengers. Therefore, none of the objections which exist against an attempt of a common carrier to release himself of his common carrier's liability would apply.

Contracts like the one in question have been held valid in the state of Massachusetts in the cases of Bates v. Old Colony Railroad Co., 147 Mass. 255, and Hosmer v. Same, 156 Mass. 506, cited *supra* on another point.

The same appears to be the law in the Province of Ontario in the case of Jennings v. Grand Trunk Ry. Co., 15 Ont. App. 477. That court made the decision turn exclusively upon the question whether there was an express contract to the effect that defendant should not be liable for injury to the express messenger, whether caused by

negligence or otherwise, and in the absence of such contract, held that defendant was liable for such negligence.

IV.

CASES CITED BY THE CIRCUIT COURT IN ITS OPINION BELOW (See 79 Fed. Rep. p. 561) TO SHOW THAT AN EXPRESS MESSENGER IS A PASSENGER WOULD NOT SUSTAIN THAT CONTENTION WHERE THERE ARE CONTRACTS BETWEEN THE RAILWAY COMPANY, THE EXRESS COMPANY AND THE EXPRESS MESSENGER SUCH AS EXIST IN THIS CASE.

The circuit court said:

"It seems to be well settled that an express messenger, though carried in a special car, when carried under a contract with a railroad company made by the express company for the transportation of express matter in his charge, is a passenger for hire." (See p. 562.)

The court cited the following authorities for the proposition:

Fordyce v. Jackson, 56 Ark. 594.
Blair v. R. R. Co., 66 N. Y. 313.
Brewer v. R. R. Co., 124 N. Y. 59.
Kenney v. R. R. Co., 125 N. Y. 422.
Woodworth v. R. R. Co., 26 O. S. 585.
Thomas v. R. R. Co., 79 Ky. 160.
Jones v. R. R. Co., 125 Mo. 666.
Jennings v. R. R. Co., 38 U. C., Q. B. 15 Ont. App. 477.

Yoemans v. Co., 44 Cal. 71.
Ketcham v. R. R. Co., 133 Ind. 346.
Chamberlain v. R. R. Co., 11 Wisc. 248.
R. R. Co. v. Wilson, 79 Texas, 371.

These authorities do not bear out the statement broadly enough to cover the present case. If the proposition that an express messenger is a passenger be correct at all, it is only so in the absence of contract on his part assuming the risks and waiving claims for injury. In none of the cases cited by the court was there any such contract on the part of the messenger. The only contract in those cases, where there was any contract at all, was one between the express company and the railway company exempting the railway company from liability to the express company. A review of the cases will show this to be correct:

Fordyce v. Jackson, 56 Ark. 594. The train on which the express messenger was riding was derailed by a bull and a rotten bridge. It affirmatively appeared that there was no contract between the express company and the railway company, or by the express messenger for the benefit of the railway company, whereby he agreed to assume the risk of injury. Nor did it appear that there was any contract between the express company and the express messenger, whereby he agreed to assume any risks. Indeed, whether the express messenger was a passenger or not was but little considered.

Blair v. Erie R. Co., 66 N. Y. 313. The messenger entered into no contract either with, or for the benefit of, the railroad company. The contract between the express company and the railway company provided for no indemnity to the railway company against injuries to the express messenger.

Brewer v. N. Y. L. E. & W Ry. Co., 124 N. Y. 59. The only contract existing was between the express company and the railway copmany. The railway company agreed to carry free of charge for the express company, its messengers, wagons, horses and grain, not exceeding three carloads in a month, and as well all packages, money, bank notes, etc., including the safes. It was then provided that in consideration thereof the express company "assumes all transportation risks and other liabilities whatsoever arising in respect thereof, and agrees to fully indemnify and protect the railway company therefrom." The court held that this general provision of the contract did not relieve the railway company from liability for injury caused by negligence; that in order to accomplish such purpose there must be a distinctly expressed intent in the contract, and that general words would be insufficient for the purpose. Speaking of the relation of the express messenger to the contract, the court said:

"It, however, does not appear that the plaintiff's intestate had any knowledge or information of the provisions of the contract between the two companies. When he entered into the service of the express company he assumed the ordinary hazards incident to that business in his relation to that company, but there was no presumption or implied understanding that the messenger took upon himself the risks of injury he might suffer from the negligence or fault of the defendant. He was in no sense the employee of the defendant, nor could he, without his consent, be subjected to the responsibilities of that relation. He was lawfully in the car, having the charge of the property and business there of the express company under its employment; and although he paid no fare to the defendant, was carried by virtue of no contract made by him person-

ally with the latter, and must have understood that he was there pursuant to some arrangement of his employer with the defendant, he was not necessarily, by that fact, chargeable with notice of the provisions in question of the contract. Presumptively he was entitled to protection against personal injury by the negligence of the defendant." (See p. 64.)

But in the present case Voigt was carried by virtue of a contract made by him personally with the express company, wherein he stipulated he would claim no damages against any railway company whose facilities the express company hired to enable it to do the express business. While lawfully on this car he was there under the terms of a contract to which he was a party.

Kenney v. N. Y. C. & H. H. Ry. Co., 125 N. Y. 422. Was an action for damages by an express messenger against the railway company for an injury. The only contract was one between the express company and the railway company. The only part of it relating to the subject was in the following words: "And the said party of the first part (the railroad company) is hereby expressly released from, and guaranteed against any liability for any damage done to the agents of the party of the second part, whether in their employ as messengers or otherwise." There does not appear to have been any assent to or knowledge of this contract on the part of the messenger. The court, after referring to the recent decision in the Brewer case, said:

"Our decision, however, is placed upon the ground that this contract does not in unmistakable language provide for an exemption from liability for the negligence of the defendant's employees. The rule is firmly established in this state that a common carrier may contract for immunity from its negligence, or that of its agents; but that, to

accomplish that object, the contract must be so expressed, and it must not be left to a presumption from the language. Considerations based upon public policy and the nature of the carrier's undertaking influence the application of the rule, and forbid its operation, except where the carrier's immunity from the consequences of negligence is read in the agreement *ipsissimis verbis.*" (See p. 425.)

The only thing there decided was that the particular contract under consideration did not cover release for injury occurring by negligence. In the present case, however, it does.

Pennsylvania Railroad Co. v. Woodworth, 26 O. S. 585. The only thing decided was that the act of the express messenger in accepting employment, whereby he was required to occupy a place on the train more dangerous than was occupied by an ordinary passenger, was not in and of itself an acceptance by him of risks resulting from the negligence of the railway company in the management of its trains not peculiar to the nature of the messenger's business. There was no question in that case as to whether he was a passenger or not, nor as to the effect of a special contract.

Thomas v. Railroad Co., 79 Ky. 160. The express messenger was killed off duty and while returning home from one of his "runs." He had no connection whatever at the time with the express business, though he was entitled by a contract between the railway company and the express company to ride free. It was not disputed by anyone in the case that he was a passenger. On the contrary, such was the contention of the railway company. (See p. 163.) Its contention was that, being a passenger, his proper place was in the passenger coach and not in the

baggage car, and that by being in the baggage car he was guilty of negligence that would defeat his recovery, inasmuch as passengers in the other cars were not hurt.

Jones v. St. Louis, etc., Ry. Co., 125 Mo. 666. This was the case of a Pullman car porter who was injured in a collision caused by the negligence of the conductor and engineman of his train in leaving a station before the arrival of a train coming from the opposite direction. The principal question in the case was whether the porter and the railroad conductor were fellow-servants. It was held they were not. There was a contract between the porter and the Pullman Car Company, whereby he agreed to release the Pullman Car Company, and also any railway company over whose lines the Pullman Car Company should operate, from any claim for damages for personal injuries received by him; but the contract did not *ipsissimis verbis* mention negligence, *nor was there any contract by which the Pullman Company agreed to indemnify the railway company.* The court, while being of opinion that the porter was to a limited extent an employee of the railway company, held that he was not an employee in such sense as to constitute him a co-servant. The court also said that he was entitled to the rights of a passenger. But that was not at all essential to the decision, because the conductor being guilty of want of ordinary care, that alone was enough to render the railway company liable to any employee not a fellow-servant. To entitle the plaintiff to recover it was not necessary to hold that he had the rights of a passenger.

Yomans v. Contra Costa S. N. Co., 44 Cal. 71. Plaintiff kept a bar on a steamboat and also acted as express agent for the Wells Fargo Co. There was no contract

whatever between the plaintiff and the defendant regulating the question of its liability to him. Nor did the question whether he was a passenger necessarily arise in the case. His right to recover in no manner depended upon his being a passenger. The defendant operated a transportation line form San Francisco to Petaluma, part of the way by steamboat and the remainder of the way by a short railroad. As the plaintiff was on the platform at the railway station, about to enter the car, the boiler of the engine exploded and he was hurt. The liability in the case was made to depend on the want of ordinary care on the part of the engineer, and not upon his failure to observe the highest degree of care that human foresight could provide, as would be the rule in regard to a passenger. It is true the court refused to instruct the jury, at the instance of the defendant, that the plaintiff was not a passenger. But the court did not charge the jury that *he was* a passenger and *did not* charge that the defendant was required to observe anything more than ordinary care.

Chamberlain v. Railroad Co., 11 Wis. 248. An examination of the opinion of the court shows it was not decided whether the express messenger was a passenger or an employee of the railway company. (See pp. 258, 259.)

Railroad Co. v. Wilson, 79 Texas, 371. Plaintiff in the case was a mail agent, and this case belongs to the class of cases to be considered under the next heading, and which are governed by a very different principle from that of an express messenger operating under such a contract as in this case. It is true the court said in its opinion that:

"Essentially the relation of carrier and passenger exists in every case in which the carrier receives and agrees to transport another not in its employment, whether this be by contract between them or between the carrier and some other person in whose employment the person to be carried is, for the purpose of transacting on the train the business of his employer, as in case of mail agents, express agents, or messengers and others having duties to their employers to perform which can be performed only by such persons traveling on railway trains or other public conveyances."

But this is not to be taken as an adjudication that an express agent might not enter into such contract as would prevent him from occupying the relation of passenger to the carrier. The broad statement that in every case in which a carrier receives and agrees to transport a person not in its employment such act necessarily establishes the relation of passenger and carrier is certainly not correct where the transportation is controlled by a contract regulating the liability and is a mere incident to conducting a business carried on by another and not by the carrier.

Jennings v. Grand Trunk Railway, 38 U. C. (Q. B.), another case cited by the court below, further illustrates the difference between the cases relied upon by defendant in erorr and the case at bar. In that case the court said:

"The answer to the defendants' next objection, namely, that the deceased was being carried under a special agreement with his employers, by which the defendants were absolved from liability for accidents occurring through their negligence, is, *that no such agreement was proved in fact*. The only agreements of which any evidence was given, were made, not with the defendants but with the Great Western Railway Company; and even if it be assumed that the defendants were working under the terms of

the second agreement, viz., the letter of the 4th April, 1879, that contains no stipulation in regard to indemnity, as did the expired agreement of the 1st January, 1874. We need not, therefore, decide whether notice to the deceased of the terms of the agreement with his employers was essential to be proved in such an action as this, as the learned chief justice at the trial, held that it was. My present impression is, that if the case turned upon the effect of the agreement of the 1st January, 1874, this ruling was correct.

"In the absence of actual notice to the deceased that he was travelling at his own risk, that agreement might well be regarded, as between the railway company and the injured party, merely as a contract by the express company to indemnify the railway company.

"See Alexander v. The Toronto & Nipissing R. W. Co., 33 U. C. R., 474; 35 U. C. R., 453, and Gallin v. The London & Northwestern R. W. Co., L. R., 10 Q. B., 212.

"There being then, as I hold, no agreement that the deceased should travel at his own risk, it is not material in an action like this, that there was no contract of carriage between him and the railway company. He was lawfully on their train as a passenger with their assent, or under some agreement, express or implied, between them and the express company, and a duty was thereby cast upon the railway company to carry him safely. It can hardly be necessary now to cite authorities upon this point."

C. C. C. & St. L. Ry. Co. v. Ketcham, 133 Ind. 346, also one of the cases cited by the court below, was that of a postal clerk travelling on a photograph commission from the government requesting railroad companies to transport him free, and directing that wherever fare was demanded he should take a receipt. At the time of the injury the clerk was not on duty, but had gotten upon a train to go from Cincinnati to Indianapolis. He first entered the pas-

senger coach and afterwards went into the postal car, and while there, at the request of the clerk in charge, was assisting in the handling of the mail at the time the injury occured.

V.

CASES OF POSTAL CLERKS IN UNITED STATES RAILWAY MAIL SERVICE.

All cases concerning injuries to this class of persons may be laid aside for the reason that postal clerks in no manner assume any risk of negligence, and in no respect waive any right or claim for damages. They enter into no contract. They enter upon the postal car in obedience to instructions from government. Their carriage is incidental to the contract with government, which contract contains no limitation as to terms on which the agent is carried. (See § 4000 R. S.) It does not concern the clerk what the arrangement between the superintendent of mail service and the railway is. Whatever it may be the clerk does not assent to it.

Comment on these cases is not necessary, except to call attention to the case standing at the head of the list, Seybolt v. the N. Y. L. E. & W. R. R. Co., 95 N. Y. 562, which clearly states the ground upon which these cases are distinguishable. The postal clerk had a pass, upon the back of which was endorsed a stipulation for an exemption from liability for damages on account of injuries occurring through negligence. The court held that the railway company, under the statute under which the mails were carried, had no right to impose that condition, and that for that reason the condition was void. The position of

the court is shown by the following extract from the opinion (at p. 574):

"The absolute duty of providing a car for the transportation of the mail, and of carrying such mail and the persons in charge thereof, is imposed by the statute, and an imperative obligation for its performance rests upon the corporation accepting the public mails for the purpose of transportation. An attempt by such a corporation to impose any other conditions upon the performance of this service than those provided by the statute, would be illegal and ineffectual to shield it from the consequences of its wrongful acts.

"It is not claimed that the superintendent of the railroad mail service, to whom this pass was delivered, had authority to enter into any contract on behalf of the government. Neither is it claimed that any contract has been made by the defendant with any other officer of the government, exempting it from liability for injuries, sustained by mail agents on account of its negligence.

"This defense must, therefore, rest upon the proposition that a person to whom is secured an absolute statutory right to transportation over a railroad, forfeits his right to damages for an injury inflicted upon him through the negligence of such railroad corporation, by the involuntary acceptance of a voucher containing provisions, intended by the corporation, to exempt it from liability for its negligence, although the person receiving it supposed it was intended solely to facilitate the enjoyment of his right of transportation.

"We are of the opinion that the agent's acceptance of the pass under the circumstances of this case did not indicate an intention to assent to the provisions therein contained, and even if it might be so construed, that the want of a consideration for such an agreement rendered it *nudum pactum*. A promise by one party to do that which he is already under a legal obligation to perform has fre-

quently been held to be insufficient as a consideration to support a contract." (Vanderbilt v. Schreyer, 91 N. Y. 392.)

It thus seems clear that a postal clerk stands on an entirely different footing from an express messenger who has made a contract with his employer that he will assume all risk incident to transportation, whether occurring by negligence of the transportation company or otherwise.

VI.

The court below, while admitting, as we understand, that the railway company is not obliged to receive an express messenger on board of its trains, yet says when it does receive him it must necessarily receive him as a common carrier. We submit that this is a *non sequitur*. If the railway company, by reason of its character of common carrier, is not compellable to receive either the express company's goods or its messenger, the railway company is certainly at liberty, when it does receive either, to receive them upon such terms as it sees fit to make, provided such contract contains no element that would render it void if made between parties confessedly not occupying the relation of common carrier.

The court below seemed to be of opinion that the Express Cases decided that a railroad company owes a duty to the public as a common carrier to do the express business, either by itself or another, and that, therefore, when a railroad company contracts with an express company for express business it is employing the express company to perform its and not the express company's duties; and that, therefore, in such matters the railroad company can

only contract on terms permitted to a common carrier in respect of a matter that falls within its public duty. An additional argument of the court was, as it seems to us, that because a railroad company is ordinarily a common carrier of passengers it can receive no person other than its employees on its train in any other capacity. We submit that the Express Cases do not warrant the conclusion which the court seems to have drawn in deciding the case below. On the contrary, this court said:

"The question is not whether these railroad companies must furnish the general public with reasonable express facilities, but whether they must carry these particular express carriers for the purpose of enabling them to do an express business over the lines." (See p. 27.)

This court said in another place:

"If the general public were complaining because the railroad companies refused to carry express matter themselves on their passenger trains, or to allow it to be carried by others, different questions would be presented. As it is, we have only to decide whether these particular express companies must be carried, notwithstanding the termination of their special contract rights." (See p. 28.)

"The exact question, then," said the court, "is whether these express companies can now demand as a right what they have heretofore had only as by permission. That depends, as is conceded, on whether all railroad companies are now by law charged with the duty of carrying all express companies in the way that express carriers when taken are usually carried, just as they are with the duty of carrying all passengers and freights when offered in the way that passengers and freight are carried." (See p. 26.)

The conclusion this court came to was that railroad companies are not charged by law with the duty of carrying

all express companies as they are with the duty of carrying all passengers and freight. And in another place the court said:

"And the real question is not whether the railroad companies are not authorized by law to do an express business themselves, nor whether they must carry express matter for the public on their passenger trains in the immediate charge of some person specially employed for that purpose."

We submit this court did not mean by this to hold that the railroad companies are bound as common carriers to do this express business for the public at large, because that question was manifestly not before it, as the court was most particular to state, more than once. We think the proper view is quite the reverse of the one which the court below took. Instead of the railroad company becoming a common carrier when it agrees to haul an express car, the express company is the one that incurs that liability and the railroad company is its mere agent, as was held in Bank of Kentucky v. Adams Express Co., 93 U. S. 174, *supra*.

The court below treated this case as falling within the reasoning of this court in the Drover's case (Railroad Co. v. Lockwood, 17 Wall. 357), but we think there is a great difference in principle between the two cases. In the Drover's case the railway company was confessedly a common carrier of cattle. It held itself out as such, and, to use the language of this court in that case it is "more accurate to say that common carriers are such by virtue of their occupation, not by virtue of responsibilities under which they rest." Being a common carrier of live stock, the railway company agreed that the compensation paid

for carrying the cattle should also include compensation for carrying the drover. He was received by the railway company unquestionably as a passenger, and the effort was to limit its liability to a passenger in case of negligence. The opening sentence of the opinion shows this. The court said:

"It may be assumed, *in limine*, that the case was one of carriage for hire; for though the pass certified that the plaintiff was entitled to pass free, yet his passage was one of the mutual terms of the arrangement for carrying his cattle. The question is, therefore, distinctly raised, whether a railroad company, carrying passengers for hire, can lawfully stipulate not to be answerable for their own or their servants' negligence in reference to such carriage."

In the Drover's case the decision is, that as the common carrier was obliged to carry the drover upon a passenger train if he presented himself and paid his fare, it could not carry him in any other capacity on a freight train, when the money paid for carriage of cattle covered his fare for transportation in the caboose. That case presents a very different state of facts from the present case. To make the present case analogous to the Drover's case it would be necessary to find the railway company doing an express business and carrying on the same train some owner of a valuable express package, who desired to give it special attention, and whose carriage was covered by the price paid for transportation of the express parcel.

The court below further endeavors to distinguish the present case from the cases cited by us, known and called the Circus Cases. The court said that in these cases the contract with the railway company was not one of carriage, but merely one of hauling or towing cars by locomotives

of the railway company, and that the freight and passengers were not entrusted to the railway company in the manner in which merchandise and passengers received by the company are entrusted to it. We fail to recognize the distinction. In the present case the contract of the railway company was not one of carriage. The carriage was being performed by the express company, as was held in Bank of Kentucky v. Adams Express Co., *supra*. Express matter is not entrusted to the railway company in any manner. As we have before shown, the railway company has no contract with the owners of the goods, it has no lien on the goods for freight, it is not charged with the receipt of the goods, and we insist that the railway company stands in the exact relation of one hauling or towing an express car.

Respectfully submitted,

EDWARD COLSTON,
Attorney for Plaintiff in Error.

JUDSON HARMON,
A. W. GOLDSMITH,
GEORGE HOADLY, JR.,
Of Counsel.

Cincinnati, March 31, 1899.

APPENDIX.

At a term of the Appellate Court, begun and held at Chicago, on Tuesday, the seventh day of March, in the year of our Lord One Thousand Eight Hundred and Ninety-Nine, within and for the First District of the State of Illinois.

Present, Hon. Henry V. Freeman, Presiding Justice; Hon. Oliver H. Horton, Justice; Hon. Henry M. Shepard, Justice.

Be it remembered, That on the 14th day of March, A. D. 1899, there was filed in the office of the Clerk of said Court an opinion of said Court, in the words and figure following, to wit:

JOHN B. BLANK, JUNIOR,
Plaintiff in Error,

vs.

ILLINOIS CENTRAL RAILROAD COMPANY,
Defendant in Error.

No. 7629.

ERROR TO THE SUPERIOR COURT OF COOK COUNTY.

STATEMENT.

The contracts referred to in the opinion are as follows:

First: The contract between plaintiff and the American Express Company, viz.:

"Whereas, I, the undersigned, have entered or am about to enter the employment of the American Express Company, and in the course of such employment may be required to render services in the care, carriage or handling of merchandise and property in course of transportation by cars, vessels and vehicles belonging to the different railroad, stage and steamboat lines upon which the company relies for its means of forwarding property delivered to it to be forwarded.

And, whereas, such express company, under its contracts with many of the corporations and persons owning or operating such railroad, stage and steamboat lines, is or may be obligated to indemnify and save harmless such corporations and persons from and against all claims for injuries sustained by its employees.

Now, therefore, in consideration of the premises and of my said employment, I do hereby assume all risk of accidents and injuries which I shall meet with or sustain in the course of my employment, whether occasioned or resulting by or from the gross or other negligence of any corporation or person engaged in any manner in operating any railroad or vessel, or vehicle, or of any employee of any such corporation or person, or otherwise, and whether resulting in my death or otherwise.

And I do hereby agree to indemnify and save harmless the American Express Company of and from any and all claims which may be made against it at any time by any corporation or person under any agreement which it has made, or may hereafter make, arising out of any claim or recovery upon my part, or the part of my representatives, for damages sustained by reason of my injury or death, whether such injury or death result from the gross negligence of any person or corporation, or of any employee of any person or corporation, or otherwise.

And I hereby bind myself, my heirs, executors and administrators with the payment to such express company, upon demand, of any sum which it may be compelled to

pay in consequence of any such claim, or in defending the same, including all counsel fees and expenses of litigation connected therewith.

And I do further agree that in case I shall at any time suffer any such injury, I will at once, without demand, and at my own expense, execute and deliver to the corporation or persons owning or operating the railroad, stage or steamboat line upon which I shall be so injured, a good and sufficient release, under my hand and seal, of all claims, demands and causes of action arising out of such injury, or connected with or resulting therefrom.

I do hereby ratify all agreements heretofore made by said express company with any corporation or persons operating any railroad, stage and steamboat line in which such express company has agreed in substance that its employees shall have no cause of action for injuries sustained in the course of their employment upon the line of such contracting party, and I agree to be bound by each and every such agreements in so far as the provisions thereof relative to injuries sustained by employees of the company are concerned, as fully as if I were a party thereto.

And I do hereby authorize and empower said express company, at any time while I shall remain in its service, to contract for me and in my behalf, in its own name or in mine, with any corporations or persons operating any railroad, stage or steamboat lines, for my transportation as a messenger or employee free of charge, upon the condition and consideration that neither I nor my personal representatives, nor any person claiming under me, will make any claim for compensation because of any injury sustained by me, whether resulting from the gross negligence of such corporations or persons, or of any employee of such corporations or persons, or otherwise, and the contracts so made shall be as binding and obligatory upon me as if signed and delivered by me.

And I do hereby further agree that the provisions of this

agreement shall be held to inure to the benefit of any and every corporation, and of all persons upon whose railroad, stage or steamboat lines the American Express Company shall forward merchandise, as fully and completely as if made directly with such corporations or persons.

I do further agree, in consideration of my employment by said American Express Company, that I will assume all risks of accident or injury which I shall meet with or sustain in the course of such employment, whether occasioned by the negligence of said company or any of its members, officers, agents or employees, or otherwise, and that in case I shall at any time suffer any such injury I will at once execute and deliver to said company a good and sufficient release, under my hand and seal, of all claims, demands and causes of action arising out of such injury or connected therewith, or resulting therefrom; and I hereby bind myself, my heirs, executors and administrators with the payment to said express company, on demand, of any sum which it may be compelled to pay in consequence of any such claim or in defending the same, including all counsel fees and expenses of litigation connected therewith.

Witness my hand and seal this 20th day of Nov., one thousand eight hundred and 93.

(Signed) JNO. BLANK.

In the presence of
(Signed) S. A. DAVIS."

Second: The contract between the American Express Company and the defendant, viz.:

"Whereas, by a certain contract, dated the 20th day of March, A. D. 1893, the Illinois Central Railroad Company, as party of the first part, and the Yazoo and Mississippi Valley Railroad Company, as party of the second part, and the American Express Company, as party of the third part, among other things, agreed as follows:

'As one of the express conditions of this contract, the party of the third part hereby binds and obligates itself to save harmless and fully indemnify the parties of the first part and second parts and each of them, their respective officers and employees, from and against all actions and liabilities for loss or damage resulting in any manner whatsoever to the freight or express matter in charge of the party of the third part, or to any of its employees, agents, messengers or officers, upon any line covered by this agreement; it being distinctly understood and agreed that all damages resulting to express matter or to persons in the service of the party of the third part (while engaged in such service) shall be borne by the American Epxress Company.'

And whereas, since making said contract, said parties have in the interests of mutual economy, upon certain trains and upon certain lines, consolidated the work of the baggageman employed by the party of the first or second part, with the work of the express messenger employed by the party of the third part—so that the same person acts as joint employee of the party of the first or second part and the party of the third part, a portion of his salary being paid by the party of the first or second part and the balance by the party of the third part, in pursuance of an agreement to that effect heretofore made by the parties hereto.

Now, therefore, in consideration of the premises and other valuable considerations, each to the other paid, the said parties hereby mutually agree that the said contract,

and the clause therein which is above quoted, shall be, and the same is hereby modified and changed to read as follows:

'As one of the express conditions of this contract, the party of the third part hereby binds and obligates itself to save harmless and fully indemnify the parties of the first and second parts, and each of them, their respective officers and employees, from and against all actions and liabilities for loss or damage resulting in any manner whatsoever to the freight or express matter in charge of the party of the third part, or to any of its employees, agents, messengers, or officers, upon any line covered by this agreement; it being distinctly understood and agreed that all damages resulting to express matter or to persons in the service of the party of the third part (while engaged in such service) shall be borne by the American Express Company.

'Provided, however, that in all cases where the same person acts jointly as baggageman for the party of the first or second part, and express messenger for the party of the third part, then that any sum or sums paid out in settlement or satisfaction of any claims made, or judgment recovered, on account of injuries sustained by such joint employee while performing duties exclusively in the interest of the party of the first or second part, outside of and away from the car in which the baggage and express packages in his charge are carried, while travelling as aforesaid, on said road, shall be assumed and borne by the party of the first or second part. But, if any claim is made, or judgment recovered, on account of injuries sustained by any such joint employee while travelling as aforesaid, on such road, while performing duties in the interest of either or any of the parties hereto, in or upon the said baggage and express car, then such sum or sums shall be borne and paid by both or all of the parties hereto, in the same proportion as they may have contributed to the salary of such employee at the time such injuries were sustained by him. Neither party, however, shall have the right to compromise

or settle any claim or suit for such injuries without the consent in writing of the other parties hereto.'

This contract shall be in force and take effect from and after the 28th day of December, 1895, and continue until the 31st day of March, 1898.

THE ILLINOIS CENTRAL RAILROAD COMPANY,
By J. T. Harahan, 2d Vice-President.

THE YAZOO & MISSISSIPPI VALLEY RAILROAD CO.,
By J. T. Harahan, 2d Vice-President.

THE AMERICAN EXPRESS COMPANY,
By A. Antisdel, General Manager."

MR. JUSTICE SHEPARD DELIVERED THE OPINION OF THE COURT.

The plaintiff was a messenger for the American Express Company, on the defendant's line of road between Chicago and Sioux City, Iowa. On January 15, 1896, the passenger train on which he was riding in the baggage car, in which the express matter he had in charge was being carried, ran into the rear corner of the caboose of a freight train which had been partly pulled off upon a switch or side track in order to permit the passenger train in which plaintiff was riding, to pass. The rear end, only, of the caboose projected upon the track of the passenger train, and a piece of one of its timbers broke into the express car and hit the plaintiff and caused the injuries of which he complains.

It appeared in evidence that the first cause of the caboose being left in its dangerous place, was the breaking of a link in the chain of freight cars that were being hauled off

upon the side track, causing the freight train to separate and leaving its extreme end—the caboose—projecting in part upon the main track.

Whether or not the defendant was liable for negligence in respect of the broken link, and the consequent collision, will not be discussed at length by us at this time, although we have considered the case in that aspect. The evidence showed, without controversy, that the defect in the link which caused it to break was a latent one beyond discovery by the exercise of all reasonable diligence; but whether, after the break, there was not time enough before the collision, in the exercise of proper diligence by defendant's servants, to have got the caboose clear of the main track is not so certain.

We prefer to place our decision upon the point that caused the trial court to take the case from the jury, by a peremptory instruction to find the defendant not guilty.

That point is, that whether there was legal negligence by the defendant or not, the plaintiff had by special contract, previously entered into, released the defendant from all liability in the premises.

We will not particularly enter upon the contention of plaintiff that such contract of release was improperly admitted in evidence under the condition of the pleadings at the time of the trial. It is enough for the purpose of getting directly at the main question in the case, which demands early decision, because not only of what is involved in this case, but collaterally, to hold, without much discussion, that the release was admissible.

The plaintiff had testified to his employment with the express company, that he knew the terms of his employment and that they were set forth in the writing identified by him as bearing his signature. The writing was then, we think, clearly admissible under the general issue, in order to show the terms and conditions of plaintiff's employment by the express company, and his relation to the defendant at the time of the accident.

The relationship of express companies to railroad companies, over whose lines express matter is carried under special contracts, is well set forth in Express Cases, 117 U. S. 1, to which we refer rather than quote from, and the doctrine there upheld is that special contracts between such companies, giving special and exclusive privileges to express companies are lawful.

It was by virtue of the contract between the defendant and the express company that the plaintiff was upon the car when he was injured. He was not in the strict sense a passenger. Nor was the defendant in the strict sense a common carrier as to him. His being carried from one end of the express route to the other, was for the purpose and none other of handling and caring for the property of his employer, the express company, which was being transported under the terms of the special contract between the express company and the defendant.

It was not the duty of the defendant as a common carrier, to carry for the express company its goods, or its messenger in charge of them, in the car in question. As a common carrier the defendant was not compelled to grant that right to the express company. It was only because of the special contract that such rights, superior to the rights of the public, were conferred and being upon the car by virtue of such contract rights the plaintiff was there subject to the burdens of the contract. His rights were those of his employer, the express company, and no greater. He could not accept the right to be there under the contract and reject the conditions under which the contract gave the right.

Had the defendant occupied in the premises the position of performing a public or *quasi* public duty to the plaintiff, such as it would have held to him if he were being carried as an ordinary passenger, we understand the law would not have permitted him to contract away his right of recourse for damages for the defendant's negligence. And in no case could a common carrier, even by express contract, in

Illinois, exempt itself from liability resulting from the gross negligence or willful misconduct committed by itself or its servants.

C. & N. W. Ry. Co. v. Chapman, 133 Ill. 96.
I. C. R. R. Co. v. Read, 37 Ill. 484.

But, under the evidence, there does not arise in this case any question of gross or willful negligence.

As already said, the defendant was not as to the plaintiff, or his employer, in the discharge of the public duties required of it as a common carrier, and the plaintiff might, therefore, as he did, contract to assume the risks of the trip himself, and release the defendant from all liability on account of injuries to him.

The plaintiff in his contract with the express company ratified, as his own, and made a part of such contract, the contract between the express company and the defendant, and agreed to be bound thereby. He was bound, therefore, to know that the express company and himself as its representative, had right to ride in the car only by special license, which he could not accept and at the same time continue to hold defendant liable for injuries that might befall him.

It is not pretended that what we have said constitutes an exhaustive or thorough opinion upon the question. It is one not yet decided by our supreme court, and the little we have said is mainly, though imperfectly, taken from opinions of the Supreme Court of Indiana, which commend themselves to us by the reason and authority there shown. A reference to Louisville, N. A. & C. Ry. Co. v. Keefer, 146 Ind. 21, and Pittsburgh, etc., Ry. Co. v. Mahoney, 148 Ind. 196, where similar contracts were involved, and able discussion is had, will serve the purposes of counsel in this case, and the profession generally, as well as could be done by an exhaustive opinion here.

Numerous minor questions are argued, concerning which we discover nothing amounting to reversible error or requiring further comment.

The judgment of the superior court is affirmed.

I, Thomas N. Jamieson, Clerk of the Appellate Court, in and for the First District of the State of Illinois, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in said cause, as appears of record in my office.

In testimony whereof, I have set my hand and affixed the seal of the said Appellate Court, at Chicago, this 29th day of March, in the year of our Lord one thousand eight hundred and ninety-nine.

[SEAL] THOMAS N. JAMIESON,
Clerk of the Appellate Court of the First District.

No. 88.

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On a Certificate from the United States Circuit Court of Appeals for the Ninth Circuit.

REPLY BRIEF FOR PLAINTIFF IN ERROR.

EDWARD COLSTON,
Attorney for Plaintiff in Error.

Junior Member,
A. V. Goldsworthy,
Graham Dobkins, Jr.,
Of Counsel.

Supreme Court of the United States.

OCTOBER TERM, 1899.

The Baltimore and Ohio South-western Railway Company,
Plaintiff in Error,

No. 88.] *vs.*

William Voight,
Defendant in Error.

On a Certificate from the United States Circuit Court of Appeals for the Sixth Circuit.

REPLY BRIEF FOR PLAINTIFF IN ERROR.

In reply to the brief filed by defendant in error in this case, we desire to submit the following considerations:

The defendant in error submits that "by an almost unanimous consensus of authority the rights of an express messenger are those of an ordinary passenger."

The defendant in error submits a list of cases which he claims supports the proposition. The cases and authorities thus submitted are those that are reviewed in the original brief for the plaintiff in error, except the following:

Chamberlain v. *Pierson*, 87 Fed. Rep. 420.

Hutchinson on Carriers, sec. 564.

Ray, Negligence of Imposed Duties, 9.

A. & E. Encyl. of Law, 512.

In none of these cases or authorities was there any contract whereby he agreed and undertook to assume the risks of the negligence of the railway company, and in that all-important feature the cases and authorities differ from the case under consideration.

In *Chamberlain* v. *Pierson*, 87 Fed. Rep. 420, it was held that the express messenger had no knowledge of the contract between the express company and the railroad company whereby the express messenger was to be furnished free transportation at his own risk while in the service of the express company, and was not for that reason bound thereby. (See second clause of syllabus.)

Hutchinson on Carriers, sec. 564, states the result of the decisions only in cases where there was no stipulation of any sort on the part of the messenger.

Ray, Negligence of Imposed Duties, p. 9, in stating the proposition that an express messenger is a passenger, and that an agreement by the express company to assume all transportation risks as to its property and express messenger, and to indemnify the railway company, will not deprive the messenger of his rights as a passenger to protection against the negligence of the railway company, adds the important qualification: "*Unless he had knowledge of such an agreement.*" (Italics ours.) *The express messenger in this case had such knowledge.*

In 5 A. & E. Encl. of Law, p. 512, the statement of the law is made with the same qualification. It is as follows:

> "Where a railroad company, *without any express contract*, undertakes to carry an express messenger in a car provided by it for the use of the express company, it owes to him the same duty to use every reasonable precaution to carry him safely that it owes to an ordinary passenger." (Italics ours.)

These authorities are all inapplicable to this case by reason of the important difference referred to.

Counsel for defendant in error claims in his brief (p. 4) that the relation between a United States postal clerk and a railroad which carries him with the mail matter is analogous to the relation existing between an express messenger and a railroad company which carries him with express matter.

Stated in this form, we admit that the analogy exists. But the statement does not present the feature of the present case which distinguishes it from the case of the postal clerk and the case of the express messenger as it is stated. The omitted feature is that the express messenger has agreed in terms that he will not hold the railroad company responsible for any injury he may sustain by negligence or otherwise, and it is only upon the faith of that agreement that he is allowed to enter the train.

Counsel for defendant in error further states in his brief (p. 4), that neither in the case of the mail carriage nor in the case of the express carriage is the railroad company obliged to enter into the contract of transportation.

It is indifferent to us whether this statement be true as to the carriage of the mail, *but the statement that the railroad company is under no obligation to enter into a contract with the express company for the carriage of express matter on passenger trains, is an admission of highest importance in this case*, because, if the railroad company were obliged *by law* to carry express matter on its taains, it would be obliged to carry with it a messenger in charge. In such case it would be difficult to see how a railroad company could carry such messenger on any other terms than as a passenger.

Counsel for defendant in error says in his brief (p. 4), that the contract with the railway company (we presume he

refers to this case) is silent as to any release of liability by the express messenger, "although," he adds, "the railway company, as to liability for the latter" (express messenger) "is guarded by an indemnity from the express company."

We are unable to appreciate the importance of the point that counsel is here making. The contract between the railway company and the express company in the case under discussion provides an indemnity to the railroad company by the express company against any claim of liability on the part of any express messenger growing out of any personal injury which an express messenger may sustain, whether such personal injury be caused by negligence or otherwise. It would have been impossible for the express company to execute any release to the railroad company for injuries done to a third person. All the express company could, in the nature of things, do was to furnish an indemnity. It could not control or release a cause of action in favor of a messenger. But the express messenger himself, in making the contract with the express company, agreed to pay the express company any sum which it might be compelled to pay under the indemnity, and agreed to execute and deliver to the railway company a good and sufficient release under his hand and seal of all claims, demands, and causes of action arising out of any such injury, and did ratify all agreements made by the express company with the railway company in which the express company had agreed its employes should have no cause of action; and the express messenger did agree to be bound by each and every of the agreements mentioned in the contract between the railway company and the express company, and he did further agree that the contract between him and the express company should inure to the benefit of the railway company as fully as if it had been made with the railway company directly.

We fail to see how any contract more direct or positive than this could under existing circumstances have been

made. It shows that the express messenger understood, when he entered the service of the express company, to operate this express route, he was assuming all the risk of personal injury that might arise from negligence or otherwise.

Counsel for defendant in error cites a number of cases to show that a postal clerk is regarded as a passenger for hire.

It is unnecessary to point out, further than we have done in our original brief, that the distinction between a postal clerk and the case of this express messenger rests in the fact that this express messenger has released the railway company from all liability, and that the postal clerk does not do so, but on the contrary is carried under a contract made by the government with the railroad company, which contract is silent on the subject of responsibility for any personal injury sustained by the postal clerk, thus leaving the clerk all the remedy he otherwise had.

Counsel for defendant in error also cites the case of *Commonwealth* v. *Railroad Co.*, 108 Mass. 7, where it was held that the seller of popped corn who had paid a price for the privilege of selling it on trains, and held a season ticked entitling him to ride for the purpose of carrying on his said business, was a passenger within the General Statutes, chap. 63, sec. 97. The season ticket in that case provided as follows :

> "The corporation assumes no liability for any personal injury received while in a train to any season ticket holder."

It was held that this limitation constituted no defense to an indictment under the statute for causing death by gross negligence. The difference between this case and the case of *Hosmer* v. *Railroad Co.*, 156 Mass. 506, and 147 Mass. 255, which were express messenger cases, seems to rest in

the fact that express messengers were permitted as a special privilege to ride in a part of the train not intended for passengers, while the pop-corn man conducted his business in that part of the train set apart for passengers only.

Counsel for defendant in error incorrectly states our contention as being one resting on the proposition that the relation of the messenger to the railroad company, which he assumes to be that of passenger and common carrier, is *changed* by the messenger's entering into the contract in this case, which proposition counsel says answers itself.

He omits to state the very point of our contention, which is, that the messenger did *not* establish between himself and the railroad company the relation of passenger and common carrier, nor was it established for him. It is an assumption on the part of counsel for defendant in error to say that such relation ever existed. The reason why the relation of passenger and common carrier did not exist between this messenger and the railroad company is because the messenger had no right upon the train except by the consent of the railroad company, and this because of the purpose for which he desired to be upon the train; a purpose different from that for which the rest of the public desired to use the train, and a purpose different from that for which the train was provided. We understand counsel to admit in another part of his brief that the only right the messenger had to be upon the train was by virtue of the special contract. (See brief, pp. 4, 7.)

The citation from *Railroad Co.* v. *Lockwood*, 17 Wall. 376, used by counsel for defendant in error in this connection, is not at all apposite. The language referred to was used in reference to an attempt on the part of the common carrier to modify his liability concerning a duty which the law cast upon him by virtue of his occupation as common carrier. The reasoning which the court condemned as unsound was the proposition that a common carrier could by

special contract lower himself to the level of an ordinary bailee, and thus acquire the capacity to make a contract which as a common carrier he could not make. To reason so was to reason in a circle. But here the railway company was not a common carrier as to this business, and therefore had the right to enter into the contracts in question, and those contracts did not alter any legal relation established between the messenger and railway company, for none had been established.

Counsel for defendant in error (brief, p. 15) seems to argue that, because the contract between the express company and the railway company did not in terms disclaim the railway company's liability as a common carrier to the express messenger, but instead required that the express company should protect the railway company and hold it harmless, this was an acknowledgment or admission on the part of the railway company that it did assume the common carrier liability to the express messenger, and only took the indemnity as a guaranty against the consequence of such liability.

This, we submit, is an assumption on the part of opposing counsel. There is no such admission in the contract between the railway company and the express company. The liability against which, by the contract with the express company, the railway company seeks protection, is not described as a common carrier's liability. The language is:

> "That the express company should protect the railway company and hold it harmless from all liability the railway company might be under to employes of the express company for injury they might sustain while being transported by the railway company over its line for the purpose aforesaid, whether the injuries were caused by negligence of the railway company or its employes or otherwise."

The particular kind of liability is not mentioned. It

may have been only a liability for want of ordinary care, or may have been liability for want of the highest degree of care of which human skill and foresight is capable. There is no admission that the railway company understood that it was providing against the consequence of a common carrier liability already incurred. The object of the contract was to prevent the common carrier liability from arising.

Counsel for defendant in error also seems to claim that the railway company cannot in this case avail itself of the contract between the express company and express messenger because of want of privity between the messenger and the railway company. But we think this claim is unfounded. As already stated in our original brief, if the express messenger should recover a judgment against the railway company, the railway company would then recover over against the express company, and the express company would recover over against the express messenger; and to avoid such circuity the railway company may plead this as a bar to the messenger's action. (*Phoenix Ins. Co.* v. *Transportation Co.*, 117 U. S., at 325.)

Counsel for defendant in error endeavors in his brief (p. 21), as we understand it, to prove that the Massachusetts cases relied on by us, cited in our original brief, are contrary to the rule established by this court in *Railroad Co.* v. *Lockwood*, 17 Wall. 357, and are therefore no authority. He endeavors to show that the rule in Massachusetts was that a common carrier might, by contract with the passenger, exempt itself from liability for injury occasioned by its negligence. But such is not the Massachusetts rule, as is shown by the case of *Doyle* v. *Fitchburg Railroad Co.*, 166 Mass., at p. 496, where the Supreme Court of Massachusetts approves *Railroad Co.* v. *Lockwood*.

The case cited by us of *Bates* v. *Old Colony R. Co.*, 147 Mass. 255, and *Hosmer* v. *Same*, 156 Mass. 506, hold that a person desiring to ride in the baggage car of a passenger

train for the purpose of conducting the express business is not *quoad hoc a passenger*, and that therefore the carrier may make a valid contract with him exempting the carrier from liability for injury to such express messenger, even though it be occasioned by negligence of the carrier.

In *Bates* v. *Old Colony R. Co.*, the court said:

> "It was not a contract for carriage over the road, but for the use of a particular car. The consideration of the plaintiff's agreement was not the performance of anything by the defendant which it was under any obligation to do, or which the plaintiff had any right to have done. It was a privilege granted to the plaintiff."

The only difference between the Bates case and the Hosmer case rests in the fact that in the Bates case the accident to the train involved only the express car; but in the Hosmer case it involved the greater portion of the train, and the question was whether the stipulation exempting from liability applied where the injury would as likely have happened if the messenger had been riding elsewhere in the train.

In *Quimby* v. *Boston & Maine Railroad*, 150 Mass., the only question involved was whether an exemption of liability for negligence in a gratuitous pass was good. The court held that the exemption was good, for the reason that a person holding such pass was not in any proper sense of the term a passenger. The court said:

> "The definition of a common carrier, which is that of a person or corporation pursuing the public employment of conveying goods or passengers for hire, does not apply under such circumstances. The service which he undertakes to render is one which he is under no obligation to perform, and is outside of his regular duties. In yielding to the solicitation of the passenger, he consents for the time being to

put off his public employment, and to do that which it does not impose upon him. The plaintiff, was in no way constrained to accept the gratuity of the defendant; it had been yielded to him only on his own solicitation. When he did, there is no rule of public policy, we think, that prevented the carrier from prescribing, as the condition of it, that it should not be compelled, in addition to carrying the passenger gratuitously, to be responsible to him in damages for the negligence of its servants. It is well known that, with all the care that can be exercised in the selection of servants for the management of the various appliances of a railroad train, accidents will sometimes occur from momentary carelessness or inattention. It is hardly reasonable that, beside the gift of free transportation, the carrier should be held responsible for these, when he has made it the condition of his gift that he should not be. Nor, in holding that he need not be under these circumstances, is any countenance given to the idea that the carrier may contract with a passenger to convey him for a less price on being exonerated from responsibility for the negligence of his servants. In such a case the carrier would still be acting in the public employment exercised by him, and should not escape its responsibilities, or limit the obligations which it imposes upon him." (See p. 371.)

In *Doyle* v. *Fitchburg Railroad*, 166 Mass. 492, it was held where the pass was not a gratuity the party using it would be a passenger, and an exemption from liability would be void.

Counsel for defendant in error claims that the Statutes of Massachusetts (Pub. Sts., chap. 112, sec. 188) made railroad companies common carriers of the express business, and consequently of the messengers and employes in charge of such business. But the Supreme Court of Massachusetts holds that the statute does not have that effect. In *Bates* v.

Old Colony Railroad, supra, speaking of this statute the court said:

> "The statute cannot be construed to require railroad corporations to discriminate in favor of express companies, and to carry their merchandise and messengers in the baggage cars of passenger trains on reasonable terms, equally favorable to all express companies." (See page 267.)

It seems clear, from an examination of the Massachusetts cases, that there is no difference between the rule adopted by that court and the rule adopted by this court on the subject of a common carrier exempting himself from liability to a passenger for injuries occasioned by negligence.

Counsel for plaintiff in error puts a great many supposed cases in his brief, such as that of a sick passenger being taken on a stretcher into a baggage car, or of a physician being called to attend an express messenger in a car in case of sudden illness, or of a passenger train breaking down in a wilderness and the passengers being obliged to ride to a place of safety in a baggage car or upon an engine, and asks whether the railroad company could in such cases *extort* a release from liability for negligence. It is clear the railroad company could not do so. The reason is because in all the instances supposed the persons had been accepted by the railroad company as passengers.

Counsel for defendant in error claims in his brief (p. 25) that the only thing this court decided in the Express Cases (117 U. S. 1) was that a railway company is not bound to act as a common carrier for all express companies that choose to apply, and that under the reasoning employed in that case a railway company *is* compellable by law to carry some one express company's business on its passenger trains, together with its messengers, safes, and also to provide a car specially appointed for express business.

Such is clearly not the decision made by this court in the Express Cases. That action was brought against the railway company by a single express company to compel the railroad to give the express company the right to do express business on that road. It was not an action brought by an excluded express company to obtain *equal* right to do the express business over the line of railroad already enjoyed by some other express company. This court in its reasoning considered that the question whether the railway company should be compelled to carry *any* express company depended solely upon whether it could be compelled to carry all express companies; that there was no such thing as a public duty to carry one express alone. To show that the railway company did not owe a public duty to carry all, and consequently not a public duty to carry any, the court entered into a careful examination of the nature of the express business and showed that it was impracticable to conduct the business over a line of railroad otherwise than under the limitations and restrictions imposed by a special contract with some particular company. The court said:

> "The exact question, then, is, whether these express companies can now demand as a right what they have heretofore had only as by permission. That depends, as is conceded, on whether all railroad companies are now by law charged with the duty of carrying all express companies in the way that express carriers when taken are usually carried, just as they are with the duty of carrying all passengers and freights when offered in the way that passengers and freight are carried." (See page 26, at bottom.)

That is to say, if not charged with the duty of carrying *all*, they were not charged with the duty of carrying *any*. Among other statements made by the court to distinguish the express business from the ordinary business of a common carrier of freights, the court adverted to the fact that no rail-

road company had ever held itself out as a common carrier of express companies (see page 21); that no railroad company had ever in practice taken an express company upon its line of railroad "except under some special contract, verbal or written, and generally written, in which the rights and duties of the respective parties are carefully fixed and defined." (Id.)

The reasons making special contracts for this business necessary are summarized by the court as follows: (1) the business is one requiring speed, and reasonable certainty as to the quantity that could be carried at any one time, and the space to be allotted therefor; (2) that the things to be carried are to be kept in the personal custody of a messenger or other employe of the express company, and therefore require a certain amount of car space to be specially set apart for the business, and that the goods to be in the exclusive possession of the expressman; (3) that as the business to be done is "express," access to the train for loading at the latest, and for unloading at the earliest, convenient moment, was necessary; all of which, said the court, was "entirely inconsistent with the idea of an express business on passenger trains free to all express carriers." (See p. 23, at bottom.) The court then showed that railroad companies, being by law carriers both of persons and property, had from the beginning provided passenger trains for the transportation primarily of persons and of their baggage, being a service requiring promptness and comfort to the passengers, and said that the express business on passenger trains was in a degree *subordinate* to the passenger business, and that it was consequently the duty of the railroad company in arranging for the express to see that there was as little interference as possible with the wants of passengers; all of which, said the court, "must necessarily be a matter of bargain, and it by no means follows that, because a railroad company can serve one express company in one way, it can as well serve

another company in the same way, and still perform its other obligations to the public in a satisfactory manner." (P. 24.) The argument of the express cases is therefore clear, that if the railroad company can not serve all express companies alike, owing to the nature of the business, it is a business it is not required *as a common carrier* to do.

Counsel for defendant in error in his brief (p. 37), says:

> "We concede without question that the contract between the express company and the railroad company, so far as it grants exclusive privileges to the express company, is a private contract, and that the fare of the messenger is covered by the contract, and to that extent his right to be on the train depends upon the contract and his employment by the express company."

Then counsel adds:

> "But that does not affect his status as a passenger or his right to safely travel."

This is a paradox! Conceding that the right of the messenger to be on the train depends upon the contract between the railway and the express, and that the contract is a private contract, that is to say, one not depending upon the public occupation of the railway as a common carrier, how is it possible for the express messenger to claim under such a contract the rights of a passenger? To the contract between the railway and the express, this messenger became a party by his agreement with the express company to pay whatever damages it should be required by the railroad company to pay to it on account of any claim of the messenger for injury, whether sustained by negligence or not, and by his further agreement to deliver to the railway a release of liability for any such injuries. Certainly, in the sense in which the term passenger is used in this case, there is no

such thing *as a passenger having no right of recovery against the carrier for injuries he may sustain by the carrier's negligence.* A person with such meagre rights would not be regarded in law as a passenger.

Counsel puts the case of a private contract with a bridge builder to repair a bridge on a railway, coupled with an agreement to transport the workmen in a baggage car without charge. He says, as soon as such persons board the train, the relation of passenger and carrier would thereby be established. That might be so, but it does not represent the present case because the bridge builder does not, in the case supposed, agree to indemnify the railroad company against any claim of his men; nor do the men agree to reimburse the bridge builder for any damages he may have to pay on account of their claim against the railway compay.

Counsel for defendant in error, at page 39 of his brief, referring to our statement in the original brief that in the cases cited by the learned Circuit Court to support the proposition that the express messenger was a passenger, mentions five cases in which he claims the express messenger was a party to or cognizant of the exemption contract between the railroad and express. But a careful examination of these cases shows our original statement to be correct. They are reviewed in our brief, at pages 35, 36, 38, 39 and 40.

Respectfully submitted,

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CINCINNATI, *November* 9, 1899.